N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly availableto all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of August , One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judg
HON. LAWRENCE W. PIERCE, Circuit Judge
HON. HOWARD T. MARKEY, Chief Judge of the United States Court of Customs and Patent Appeals*

- -X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ORDER
82-1107

CHAKIB SAAD, JOSEPH GEMAYAL, and YACOUB FAYAD.

Defendants,

CHAKIB SAAD,

Defendant-Appellant.

- -X

*Sitting by designation

This is an appeal from a judgment of conviction of the United States District Court for the Eastern District of New York entered after a trial before Mishler, D.J., and a jury. Appellant was convicted of conspiracy to import and distribute heroin, 21 U.S.C. §§ 846 and 963, and possession of heroin with intent to distribute. 21 U.S.C. § 841.

Joseph Gemayel, appellant's alleged accomplice, was arrested in the middle of a drug transaction with undercover agents from the Drug Enforcement Administration. On the basis of information obtained from Gemayel, and corroborated in part by hotel records, the agents proceeded to Saad's hotel room. After ascertaining that Saad was in the room, they identified themselves and requested entry. Instead of the door being opened, the agents heard the sound of a window being opened. Forcing the door, agents observed that, although a window was open, Saad was still in the room. However, packages of heroin were discovered on a roof below which looked like they had recently been thrown from an upper story window. At trial, the Government

proved the cirsumstances surrounding discovery of the heroin and introduced evidence linking Saad and Gemayel to the same hotel room.

Saad contends the evidence was insufficient to support the verdict. We disagree. Viewing the circumstantial evidence of guilt in its totality, United States v. Barnes, 604 F.2d 121, 156 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), and in the light most favorable to the Government, id. at 157, it was sufficient to support the conviction.

Appellant's remaining arguments are equally meritless. Appellant's pretrial suppression motion was properly denied. The warrantless entry of Saad's hotel room and his warrantless arrest by DEA agents were supported by probable cause and justified by exigent circumstances. Had the agents not effected an entry, appellant, rather than the heroin, might have gone out the window. See United States v. Reed, 572 F. 2d 412, 424 (2d Cir.), cert. denied, 439 U.S. 913 (1978). Appellant consented to the search of his room and had no standing to object to the search of

the hotel roof. United States v. McLaughlin, 525 F.2d 517, 519-20 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976).

The two remarks by the prosecutor concerning agent Mangor's "undisputed" testimony and appellant's presence in room 1713A do not amount to reversible error. The former was not addressed to appellant's failure to testify and any wrongful inference arising out of the latter was rendered harmless by the court's curative instruction.

The district court did not commit prejudicial error in permitting the in-court experiment by the jury. The results of the experiment favored appellant, and the error, if any, was harmless.

The judgment of conviction is affirmed.

Hon. Ellsworth A. Van Graafeiland

Hon. Lawrence W. Pierce

Hon. Howard T. Markey

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

- against -

JOSEPH GEMAYEL, CHAKIB SAAD and YACOUB FAYAD,

Defendants.
----------X

80 CR 00702

MEMORANDUM OF DECISION AND ORDER

February 18, 198

MISHLER, District Judge

Defendant Chakib Saad moves pursuant to Rule 41 of the Federal Rules of Criminal Procedure to suppress as evidence the seizure in Room 1713 A of the New York Statler Hotel on December 13, 1980. The Court conducted an evidentiary hearing and finds as follows:

On Friday, December 12, 1980 DEA Special Agent Benny T. Mangor, acting in an undercover capacity, met with defendants Joseph Gemayel and Yacoub Fayad at the Host Restaurant at J.F.K. International Airport to discuss a shipment of hashish from Lebanon.

Gemayel volunteered that he had just purchased a round trip ticket to Miami for the owner of two kilograms of heroin for which Special Agent Edwin Hernandez (also acting in an undercover capacity) had negotiated during the summer. The owner, later identified as Saad, made the trip to pick up the heroin in Miami. Fayad left the meeting and then Hernandez entered the meeting to discuss the terms of sale, the method of transferring the heroin and the purchase price. Gemayel advised Mangor and Hernandez that the heroin would be at the Statler Hotel the next day, i.e., December 13, after 5:00 p.m. Mangor called Gemayel at the Statler Hotel and was advised that he had two and one half (2 ½) kilograms of heroin. They arranged to meet at the airport at about 7:15 p.m.

Gemayel came to the airport with one half (½) Kilogram of heroin and advised Mangor that Saad directed him to deliver that quantity and after Saad received the money at the Hotel Statler he would deliver and additional kilogram.

Gemayel was placed under arrest at the airport. He identified the owner of the heroin as the occupant of Room 1713A at the Statler Hotel.

Mangor, Hernandez and special agent Jamie Castillo left the airport at about 8:00 p.m. and arrived at the Statler Hotel at about 9:00 p.m. They identified themselves as federal agents to John Perrotto and advised him that they came to arrest the occupant of Room 1713A. Mangor asked for a passkey. Perrotto, Vincent Palmieri (a house officer of the Statler Hotel) and the three agents proceeded to the 17th floor of the hotel. Mangor asked that a phone call be made from the dispatcher's desk of the hotel to be timed with the anticipated entrance into the room, to ascertain the presence of the occupant in the room at the time of entry. Palmieri was at the door with Mangor. Mangor heard the telephone ring as pre-arranged. He knocked on the door. The occupant asked

who it was and Plamieri announced that it was hotel security and asked the occupant to open the door. Mangor heard the occupant say, "Wait a minute". Mangor then announced that they were federal agents and demanded that the door be opened immediately. The occupant said, "Wait a few minutes," or "I'll be right there." Mangor then heard a movement away from the door and the sound of a window opening. Palmieri opened the door with a passkey at Mangor's direction. Entrance was barred by a security chain on the door. Hernandez broke the chain by kicking the door in. The agents entered with drawn guns. They observed Saad in the middle of the room. They then returned the guns to their holsters. Saad was placed under arrest. Mangor saw something on the roof of the second floor of the hotel through the open window. Hernandez went to investigate with Perrotto and retrieved four (4) one-half (½) Kilograms of heroin.

In the meantime special agent Castillo advised Saad that the agents were conducting a narcotics investigation. Castilio twice read Saad his constitutional rights and warned him of the consequences of waiving those rights as required under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Saad understood 1 his constitutional rights under the Fifth and Sixth Amendments and signed a waiver of his rights. Castillo asked Saad for permission to search the room. Having been previously advised that the agents were conducting a narcotics investigation he knowingly and voluntarily gave his consent verbally. Castillo then sat down with Saad on the sofa and read a consent to search form. Saad understood he was giving consent to search the room for evidence of narcotics crimes and he signed the form. A briefcase and contents were seized. Saad surrendered his passport. Saad made statements concerning his purpose in visiting the United States

and his travel in this country.

Discussion

United States v. Reed, 572 F 2d 412 (2d Cir.), cert. denied sub nom., 439 U.S. 913, 99 S. Ct. 283 (1978) establishes the circumstances under which an officer may enter a suspect's home without a warrant for the purpose of making an arrest. The holding in United States v. Reed, supra, 572 F.2d at 424 is succinctly states as follows:

> [I]n the absence of a warrant to arrest a suspect at home, and in the absence of exigent circumstances, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to effect a felony arrest for which they otherwise have both statutory authority and probable cause. 3

Exigent circumstances include: commisssion of a grave offense, belief that the suspect is armed, probable cause to believe the suspect has committed the crime, suspicion that the suspect is on the premises, likelihood of escape if delay ensues, and peaceful entry

by the police." United States v. Jarvis, 560 F.2d 494, 498 (2d Cir. 1977), cert. denied, 435 U.S. 934, 98 S. Ct. 1511 (1978), cited in, United States v. Reed, supra, 592 F.2d at 424. The threatened destruction of evidence may establish exigent circumstances to justify entry into a home without a warrant. United States v. Montiell 526 F.2d 1008, 1009-1010 (2d Cir. 1975). Accord, United States v. Blake, 484 F.2d 50,55 (8th Cir. 1973). Slamming the door on a known law officer may also establish exigent circumstances. United States v. Gomez, 633 F.2d 999, 1007 (2d Cir. 1980), citing United States v. Cisneros, 448 F.2d 298, 302 (9th Cir. 1971). If "an immediate major crisis in performance of duty affords neither time nor opportunity to apply to a magistrate," the home may be entered for either an arrest or search. Accarino v. United States, 179 F. 2d 456, 464 (D.C. Cir. 1949) (cited with approval in Reed).

In the instant case Mangor and Hernandez were advised that the occupant in Room 1713A was in possession of two (2) kilograms of high quality heroin; that he was a Lebanese citizen who entered the country to consummate the narcotics transaction and make a quick exit out of the country. He was waiting in his room for the delivery of approximately $70,000 that would indicate that the purchaser of his heroin was ready for delivery of an additional kilogram. Any delay in Gemayel's return to the hotel would alert him to the possibility of detection of his criminal activity.

It is clear that exigent circumstances existed for the warrantless arrest of Saad and/or the search of Room 1713A: The offense was grave (Saad had imported two (2) Kilograms of high quality heroin); there was probable cause to believe he was in Room 1713A at the time of entry; there was probable cause to believe that there was a likelihood

of escape and/or destruction of the evidence if entry was delayed until a warrant could be obtained.

Saad alludes to the forceful entry of his room. He makes much of the manner in which the agents drew their guns. Narcotics dealers are usually armed or have bodyguards to protect the narcotics or the proceeds of their sales. His argument that the seizure should be invalidated because Hernandez broke the chain in forcing the door open is rejected. See United States v. Montiell, 526 F. 2d 1008, 1009-1010 (2d Cir. 1975).

The motion to suppress is in all respects denied, 4 and it is

SO ORDERED.

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U. S. D. J.

FOOTNOTES

1 A question was raised as to Saad's ability to understand the English language. I find that Saad's comrehension of the English language was adequate. He understood the demands and commands of Mangor at the door of the room and the adivce of rights and the effect of the consent to search.

2 Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 1378 (1980) decided the narrow question of the constitutionality of a New York statute authorizing a warrantless, nonconsensual entry into a suspect's home in order to make a routine felony arrest. The opinion is,nevertheless, instructive on the issue here.

3 The principle relates back to the expectation of privacy enunciated in Katz v. United States, 389 U.S. 347, 351-352, 88 S. Ct. 507, 511-512 (1967). The court in Reed notes: "It is also clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts." 572 F.2d at 422. This court assumes without deciding, that the occupant of a hotel room as a transient guest has the same expectation of privacy as one has at home.

4 The court finds that Saad threw two (2) Kilograms of heroin out the window which was retrieved by Hernandez. The seizure was proper for the reasons stated and the further reason that the

discarded heroin may be considered abandoned property. United States v. Alden, 576 F. 2d 772 (8th Cir), cert. denied, 439 U.S. 855, 99 S. Ct. 167 (1978).

APPENDIX C

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT TO THE UNITED STATE CONSTITUTION;

> "No person ..... shall be compelled in any criminal case to be a witness against himself...."